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FIRST GENERAL COUNSEL'S REPORT

MUR 6817

DATE COMPLAINT FILED: May 8, 2014 and
May 16, 2014 (Supplemental)

DATE OF NOTIFICATIONS: May 13, 2014 and
May 22, 2014 (Supplemental)

LAST RESPONSE RECEIVED: July 21, 2014

DATE ACTIVATED: September 9, 2014

EARLIEST SOL: March 19, 2019

LATEST SOL: May 16, 2019

ELECTION CYCLE: 2014

COMPLAINANT:

Frank Dixon

RESPONDENTS:

Dr. Monica Wehby for U.S. Senate and Bryan
Burch in his Official Capacity as Treasurer

Dr. Monica Wehby
If He Votes Like That In Salem Imagine What He
Will Do In Congress and Carol Russell in her
Official Capacity as Treasurer
Andrew Miller

**RELEVANT STATUTES AND
REGULATIONS:**

52 U.S.C. § 30101(8)(A)(i)¹
52 U.S.C. § 30104(b)
52 U.S.C. § 30104(g)
52 U.S.C. § 30116(a), (f)
52 U.S.C. § 30120(a)
11 C.F.R. § 100.52(d)(1)
11 C.F.R. § 104.3
11 C.F.R. § 104.4(b)(2)
11 C.F.R. § 109.21
11 C.F.R. § 110.11

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

¹ On September 1, 2014, the Federal Election Campaign Act, as amended, (the "Act") was transferred from Title 2 of the United States Code to new Title 52 of the United States Code.

I. INTRODUCTION

This matter concerns allegations that Dr. Monica Wehby, a 2014 candidate for Senate in Oregon, Dr. Monica Wehby for U.S. Senate ("Wehby Committee"), her principal campaign committee, and If He Votes Like That In Salem Imagine What He Will Do In Congress ("If He Votes"), an independent expenditure-only political committee, violated various provisions of the Federal Election Campaign Act, as amended, (the "Act") in connection with two public communications that criticized Wehby's primary opponent, Representative Jason Conger. Specifically, the Complaint alleges that If He Votes made a prohibited contribution to Wehby by coordinating a billboard and radio advertisement with the Wehby campaign. The Complaint further alleges that If He Votes failed to report polling expenses connected to these advertisements, include the proper disclaimers, and file 48-Hour Independent Expenditure Reports for the two communications in question.

The record before the Commission indicates that the advertisements do not satisfy the conduct prong of the Commission's coordinated communications regulations. For this reason, we recommend that the Commission find no reason to believe that If He Votes made, or Wehby or her campaign accepted, in-kind contributions as a result of the advertisements in violation of 52 U.S.C. § 30116(a) and (f) (formerly 2 U.S.C. § 441a(a) and (f)), respectively. Further, because of the vagueness of the evidence suggesting that If He Votes incurred polling expenses or accepted any polling results that it should have reported to the Commission, and in light of a sworn denial from an individual who appears to have had personal involvement in the activities at issue, we recommend that the Commission dismiss the allegation that If He Votes violated 52 U.S.C. § 30104(b) (formerly 2 U.S.C. § 434(b)). It does appear that If He Votes failed to include a complete and accurate disclaimer on the radio advertisement. However, based on the

1 circumstances, we recommend that the Commission dismiss with caution the allegation that If
2 He Votes violated 52 U.S.C. § 30120(a) (formerly 2 U.S.C. § 441d(a)). Finally, it appears that If
3 He Votes failed to file a 48-Hour Independent Expenditure Report for the radio advertisement.
4 Accordingly, we recommend that the Commission find reason to believe that If He Votes
5 violated 52 U.S.C. § 30104(g) (formerly 2 U.S.C. § 434(g)), enter into pre-probable cause
6 conciliation with If He Votes,

7 **II. FACTS**

8 **A. Background**

9 Dr. Monica Wehby was a candidate in the 2014 Republican Senate primary in Oregon.²
10 She filed her Statement of Candidacy with the Commission on October 24, 2013. The Wehby
11 Committee is Wehby's authorized campaign committee. Representative Jason Conger was
12 Wehby's opponent in the primary race.

13 If He Votes is an independent expenditure-only political committee registered with the
14 Commission. It filed its Statement of Organization on March 5, 2014, and has regularly filed
15 disclosure reports and independent expenditure notices with the Commission. According to If
16 He Votes, Rodney Stubbs was the founder and original treasurer of If He Votes, which he
17 formed to oppose Conger "because of his bad voting record" as an Oregon State legislator. If He
18 Votes Resp. at 5; Gregg Clapper Decl. at 1-2 (May 23, 2014); Rodney Stubbs Decl. at 1-2 (May
19 23, 2014).

20 To date, If He Votes has been funded primarily by two individuals, Loren Parks and
21 Andrew Miller. Parks and Miller have contributed \$83,033 and \$30,950, respectively, of the

² Wehby won the Republican primary on May 20, 2014, making her the Republican nominee for the general election. Wehby lost the general election on November 4, 2014.

1 \$114,033 that If He Votes has received in total receipts since its formation. Of the \$30,950 that
2 Miller contributed to If He Votes, \$5,950 consisted of in-kind "billboard" expenses. See If He
3 Votes 2014 April Quarterly Report (filed Apr. 14, 2014).

4 According to the Respondents, Parks and Miller "were simply funders" and "were not
5 informed about the activities of If He Votes." If He Votes Resp. at 3-5; Miller Resp. at 1;
6 Clapper Decl. at 2. Further, the Respondents specifically assert that Miller is not an agent or
7 representative of If He Votes. If He Votes Resp. at 3, 5; Miller Resp. at 1; Clapper Decl. at 2.

8 Miller also contributed \$5,200 to the Wehby Committee on November 1, 2013, and was
9 one of 25 hosts listed on an invitation for a Wehby Committee fundraiser at a private residence
10 on April 30, 2014. See Wehby Committee 2013 Year-End Report (filed Jan. 26, 2014); Compl.,
11 Ex. C.

12 **B. If He Votes' Communications**

13 Since its formation, If He Votes has sponsored at least two communications criticizing
14 Conger.³ The first advertisement was a billboard, for which Miller appears to have made the
15 in-kind contribution in the amount of \$5,950.⁴ If He Votes states that the billboard was
16 displayed for two weeks beginning on March 19, 2014. See If He Votes Resp. at 6. The
17 billboard, as represented in a photograph attached to the Complaint, read:

18 *Republican (?) Jason Conger voted 5 times with Democrats for Oregon's*
19 *OBAMACARE! Imagine how he'll vote as a U.S. Senator.*

³ According to If He Votes' Response, which was dated May 23, 2014, If He Votes "had only those two communications." If He Votes Resp. at 6. If He Votes' disclosure reports, however, indicate that it also made an independent expenditure of \$6,860 for a "mailer" opposing Conger on May 15, 2014. See If He Votes 2014 July Quarterly Report (filed July 15, 2014). This mailer is not raised in the Complaint, and we do not address it in this Report.

⁴ If He Votes reported the receipt and corresponding disbursement of a \$5,950 "In-Kind: Billboard" contribution from Miller on March 19, 2014, on its 2014 April Quarterly Report. If He Votes did not report any additional receipts or expenditures that appear related to billboard time or production.

1 Paid for by If He Votes Like That In Salem Imagine What He Will Do In Congress
2 (www.ifhevoteslikethatinsalem.com) and not authorized by any candidate or
3 candidate's committee.

4 Compl., Ex. A (emphases in original).

5 The second advertisement was a radio advertisement that aired from April 11, 2014, to
6 May 16, 2014. *See* If He Votes Resp. at 6. The radio advertisement, as represented in an audio
7 clip and transcript attached to the Complaint, ran 57 seconds, and stated:

8 Republican Jason Conger voted with Democrats for Oregon's Obamacare. Not once
9 or twice, or three or four times – Republican Jason Conger voted five times with
10 Democrats for Oregon's Obamacare. Republican Jason Conger also voted with
11 Democrats for the boondoggle I-5 light rail bridge. You know, the one that promised
12 astronomical costs coupled with high tolls for working people, but no traffic relief.
13 And Republican Jason Conger voted with Democrats to put the government into the
14 hotel business, competing with private enterprise. Jason, Republicans don't like it
15 when you vote that way. So now we're gonna vote 'no' on Jason Conger!

16
17 Paid for by If He Votes Like That In Salem Imagine How He Will Vote In Congress.
18 Not authorized by any candidate or candidate's committee.

19 Compl. at 2 n.2 (citing Jeff Mapes, *Timber Baron Andrew Miller Says He Didn't Tell Monica*
20 *Wehby About His Ads Attacking Jason Conger*, THE OREGONIAN, Apr. 16, 2014,
21 http://www.oregonlive.com/mapes/index.ssf/2014/04/timber_baron_andrew_miller_say.html
22 (“Mapes, *Timber Baron*”) (providing an audio clip of the radio advertisement)), Ex. B.

23 Throughout the course of the primary campaign, several news articles discussing the
24 activities of If He Votes mentioned that Miller had been “romantically linked to” Wehby and
25 involved in her campaign fundraising. Compl. at 2-4.⁵ In response to these news reports, Miller

⁵ The Complaint specifically cites to Christian Gaston, *Top Oregon GOP Donor Andrew Miller Has Ties to Candidates for Governor, Senate and Congress*, THE OREGONIAN, Oct. 30, 2013, http://www.oregonlive.com/politics/index.ssf/2013/10/top_oregon_gop_donor_andrew_mi.html, and Jeff Mapes, *Andrew Miller, Friend of Monica Wehby, Helps Fund Ads Attacking Her GOP Rival, Jason Conger*, THE OREGONIAN, Apr. 15, 2014, http://www.oregonlive.com/mapes/index.ssf/2014/04/andrew_miller_friend_of_monica.html. According to a news report referenced in If He Votes' Response, Miller and Wehby ended their dating relationship in the spring of 2013. If He Votes Resp. at 4, Ex. 1 (attaching John

1 publicly denied coordinating with the Wehby campaign and was quoted as stating that "the
2 advertising campaign [by If He Votes] was run independently of Wehby and her campaign as
3 required by federal election law." *Id.* at 2 n.2 (citing Mapes, *Timber Baron*). According to a
4 news article in *The Oregonian*:

5 Miller acknowledged that there is a "sidebar risk" that his advertising effort could be
6 seen negatively because of his relationship to Wehby. But, he added, "I don't think
7 it's relevant outside of a group of people who pay a lot of attention to politics."
8 [Miller] said polling showed this risk was far outweighed by the effectiveness of the
9 attacks he and Parks are making on Conger's voting record in the state House.

10 *Id.*

11 The Respondents state that Gregg Clapper, a political consultant, was hired to develop
12 the two If He Votes communications and did not consult with anyone other than Stubbs. If He
13 Votes Resp. at 3; Miller Resp. at 1; Clapper Decl. at 2. Clapper attests that he "personally did
14 nearly 100% of the concept, message development, strategy and other aspects of these
15 communications," and that "[o]nly some graphic design staff, and web design staff, and the voice
16 actor worked on parts of the communications before they were public." Clapper Decl. at 2.
17 Clapper attests that he did not have any relationship with Wehby or her campaign. *Id.* at 3. He
18 also attests that Miller "did not and was not allowed to have any input into the messaging,
19 content, or even the advertisement strategy" for the advertisements, including the billboard. *Id.*
20 at 2; *see also* If He Votes Resp. at 3; Miller Resp. at 1. With regard to the in-kind contribution
21 from Miller in connection with the billboard, Clapper avers that If He Votes merely "took
22 advantage of that [donation of some billboard time] for about a two week period." *See* Clapper
23 Decl. at 2. Stubbs attests that he met Miller and a few people from the Wehby campaign "over

1 the course of their campaign, but . . . [Stubbs] was not in charge of [If He Votes'] messaging, and
2 nobody from the outside ever made any suggestions or request . . . for any kind of content or
3 messaging." Stubbs Decl. at 2. Stubbs' declaration further states that he handled the
4 "checkbook and expenditures of funds" and Clapper "was completely in charge of the
5 messaging." *Id.*

6 III. LEGAL ANALYSIS

7 A. There is no reason to believe that the billboard or radio advertisement were 8 coordinated communications.

9 The Complaint alleges that If He Votes made a prohibited contribution to Wehby by
10 coordinating the billboard and radio advertisement with the Wehby campaign. Compl. at 3-4;
11 Supp. Compl. at 3-4. Under the Act, when a person or committee pays for a communication that
12 is coordinated with a candidate or his or her authorized committee, the communication is
13 considered an in-kind contribution from the person or committee to that candidate and is subject
14 to the limits, prohibitions, and reporting requirements of the Act. 52 U.S.C. § 30116(a)(7)(B)(i)
15 (formerly 2 U.S.C. § 441a(a)(7)(B)(i)); 11 C.F.R. § 109.21(b). A communication is coordinated
16 if it: (1) is paid for by a person other than the candidate or candidate's committee; (2) satisfies
17 one or more of the four content standards set forth at 11 C.F.R. § 109.21(c); and (3) satisfies one
18 or more of the six conduct standards set forth at 11 C.F.R. § 109.21(d). 11 C.F.R. § 109.21.

19 In this matter, the payment and content prongs are satisfied, which the Respondents do
20 not dispute. *See If He Votes Resp.* at 6-8, Ex. 5. If He Votes reported making a \$5,950
21 disbursement for billboard expenses on March 19, 2014, and \$59,557 in total independent
22 expenditures for "radio ads" between April 1, 2014, and April 3, 2014. *See* 11 C.F.R.
23 § 109.21(a)(1). Moreover, based on the information provided in the Complaint and Responses, it
24 appears that the billboard and radio advertisement meet the content prong because each is a

1 public communication that clearly identified Conger, was disseminated within 90 days of the
2 May 20, 2014, primary election, and was targeted to voters in Oregon. *See* 11 C.F.R.
3 § 109.21(c)(4).

4 Here, the main issue is whether the communications satisfied the conduct prong. The
5 conduct standard is satisfied when, among other things, the communication is made at the
6 request or suggestion of a candidate, a candidate or authorized committee is materially involved
7 in decisions regarding the communication, or a communication is made after substantial
8 discussion about that communication with a candidate.⁶ *See* 11 C.F.R. §109.21(d)(1)-(3). The
9 material involvement and substantial discussion standards are not satisfied if the information
10 material to the creation, production, or distribution of the communication was obtained from a
11 publicly available source. *See* 11 C.F.R. § 109.21(d)(2)-(3).

12 The Complaint asserts that the conduct standard was satisfied because Miller was
13 "intimately involved" with Wehby both personally and as a fundraiser, and therefore likely
14 "exposed to nonpublic information about the campaign's nonpublic plans, projects, activities, or
15 needs." Compl. at 4. The Complaint also asserts that "Miller was intimately involved in the
16 strategic decision-making of If He Votes" because he had spoken on the public record as a
17 representative of the committee and was a significant contributor to If He Votes. *Id.* at 3.
18 Finally, the Complaint asserts that by donating in-kind billboard advertising space, Miller was
19 involved "in decisions regarding the time, place, and manner" of the advertisement. *Id.*

⁶ The other three types of conduct that may satisfy the conduct standard are using a common vendor, using a former employee, and republication of campaign materials. *See* 11 C.F.R. § 109.21(d)(4)-(6). Because the Complaint does not allege this conduct, and because the Respondents assert that Clapper did not do any work for Wehby or her campaign, *see* If He Votes Resp. at 6; Clapper Decl. at 3, our analysis does not address these three types of conduct.

1 The record before the Commission, however, does not support the allegation that Miller
2 requested or was materially involved in If He Votes' decision-making regarding the contents,
3 audience, means, outlet, timing, prominence, or duration of the billboard and radio
4 advertisement. *See* 11 C.F.R. § 109.21(d)(1)-(2). Although Miller contributed funds and "the
5 use of some billboard time" to If He Votes, that fact alone does not establish that he requested or
6 made decisions concerning how those funds or billboard time was used. To the contrary, the
7 Respondents assert — including in a sworn declaration — that Miller had "no input into the two
8 communications." If He Votes Resp. at 3; Miller Resp. at 1; Clapper Decl. at 2.

9 Even assuming that Miller's position as a funder granted him some role in If He Votes'
10 decision-making process, the record before the Commission also does not establish that Miller
11 had any information concerning Wehby's non-public campaign strategy or was otherwise an
12 agent of the Wehby campaign. Beyond referencing a Wehby Committee fundraising invitation
13 listing Miller as one of 25 hosts, and Miller and Wehby's reported "personal relationship"
14 (which one source indicated had ended in the spring of 2013),⁷ the Complaint does not provide
15 any specific information as to where, when, or how Wehby or her campaign requested,
16 suggested, assented to, or had substantial discussions concerning If He Votes' activities or the
17 specific communications in question. Miller and If He Votes deny that there was any sharing or
18 coordination of information between Wehby and the "PAC campaign in question." If He Votes
19 Resp. at 3; Miller Resp. at 1; Clapper Decl. at 2.⁸ Although the Complainant suggests that it is
20 "implausible" that Miller would not be exposed to non-public information about the campaign's

⁷ *See supra* note 5. Wehby did not announce her candidacy for Senate until October 2013.

⁸ Wehby and the Committee do not directly deny the coordination allegation in their joint Response, but instead assert that the Complaint is purely speculative and therefore does not establish that there is reason to believe a violation of the Act occurred or require a denial. *See* Wehby Resp. at 2-8.

1 plans via his alleged close personal relationship with Wehby, this — by itself — is not enough to
2 provide reason to believe that there was coordination.⁹ Accordingly, it does not appear that
3 Miller requested, was materially involved in, or had substantial discussions about the
4 communications on behalf of Wehby or her authorized committee. *See* 11 C.F.R.
5 § 109.21(d)(1)-(3).

6 In sum, it does not appear that the billboard or radio advertisement satisfy the conduct
7 prong. Therefore, we recommend that the Commission find no reason to believe that If He Votes
8 made, or Wehby or her campaign accepted, in-kind contributions as a result of the
9 advertisements in violation of 52 U.S.C. § 30116(a) and (f) (formerly 2 U.S.C. § 441a(a) and
10 (f)), respectively.

11 **B. The Commission should dismiss the allegation that If He Votes failed to**
12 **report polling expenses.**

13 The Complaint also alleges that If He Votes failed to report polling expenses connected
14 to the two advertisements. Supp. Compl. at 4. As noted above, Miller reportedly stated that
15 “polling showed” that any “optics” of coordination in light of his relationship with Wehby were
16 “far outweighed by the effectiveness of the attacks.” Compl. at 2 n.2 (citing Mapes, *Timber*
17 *Baron*); Supp. Compl. at 2 n.1 (same). The Complaint asserts that this statement indicates that If
18 He Votes accepted and used third-party polling to determine whether its advertising would be

⁹ Cf. First General Counsel's Rpt. at 9, MUR 6611 (Ruderman, *et al.*) (noting that a filial relationship, without evidence of a specific conversation, was “too thin a reed” by which to conclude that material information must have been shared); First General Counsel's Rpt. at 8 n.7, MUR 6277 (Kirkland for Congress, *et al.*) (noting that a sibling relationship, and the fact that the candidate's brother had previously sent a fundraising e-mail for his campaign committee, were “irrelevant” to a coordination analysis, “since those same facts equally support [the brother's] desire to undertake an independent expenditure effort to assist his brother's candidacy”). The Commission split on this Office's recommendations in MURs 6611 and 6277, and did not issue a Factual & Legal Analyses in those cases. This case is even farther removed from those cases, however, because it does not involve a family member.

1 effective, but failed to report any disbursements or in-kind receipts for polling to the
2 Commission. Supp. Compl. at 4.

3 The Act requires committee treasurers to file reports of receipts and disbursements in
4 accordance with the provisions of 52 U.S.C. § 30104 (formerly 2 U.S.C. § 434). 52 U.S.C.
5 § 30104(a)(1) (formerly 2 U.S.C. § 434(a)(1)); 11 C.F.R. § 104.1(a). These reports must include
6 the total amount of receipts and disbursements. 52 U.S.C. § 30104(b) (formerly 2 U.S.C.
7 § 434(b)); 11 C.F.R. § 104.3. The Act also requires committees to disclose itemized breakdowns
8 of receipts and disbursements; and disclose the name and address of each person who has made
9 any contribution or received any disbursement in an aggregate amount or value in excess of \$200
10 within the calendar year, together with the date and amount of any such contribution or
11 disbursement. 52 U.S.C. § 30104(b)(2)-(6) (formerly 2 U.S.C. § 434(b)(2)-(6)); 11 C.F.R.
12 § 104.3(a)(3)-(4), (b)(2)-(4).

13 Commission regulations treat a committee's acceptance of opinion poll results as an
14 in-kind contribution from the purchaser to the committee. 11 C.F.R. § 106.4(b). Acceptance
15 occurs when a committee requests the results, uses the results, or does not notify the contributor
16 that the results are refused. *Id.* A committee's acceptance of any opinion poll results that have
17 been made public prior to receipt without request, prearrangement, or coordination by the
18 recipient committee does not result in an in-kind contribution. *Id.* § 106.4(c).

19 If He Votes' Response generally denies that it used any polling. If He Votes Resp. at 7;
20 Clapper Decl. at 2; Stubbs Decl. at 2. Further, Clapper states in a sworn declaration that If He
21 Votes "did not use any polling information, . . . did not . . . conduct any polling[, and] did not use
22 anyone else's polling." Clapper Decl. at 2. Miller's Response, however, asserts that the
23 "[p]olling noted in the complaint . . . was polling conducted by Mr. Clapper." See Miller Resp.

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1 at 1. In light of Clapper's explicit and sworn denial, which is purportedly based on personal
2 involvement in the activities at issue, and because it is not clear from Miller's statements the
3 basis for his belief that Clapper conducted and/or used polling to determine whether If He Votes'
4 advertising would be effective, we recommend that the Commission dismiss the allegation that If
5 He Votes violated 52 U.S.C. § 30104(b) (formerly 2 U.S.C. § 434(b)). *See Heckler v. Chaney*,
6 470 U.S. 821 (1985).¹⁰

7 **C. The Commission should dismiss with caution the allegation that If He Votes**
8 **failed to include the proper disclaimer on the radio advertisement.**

9 The Complaint further alleges that the radio advertisement did not include the proper
10 disclaimer. Compl. at 3. The available information indicates that the radio advertisement stated
11 that it was "Paid for by If He Votes Like That In Salem Imagine What He Will Do In Congress"
12 and "not authorized by any candidate or candidate's committee." Compl. at 2 n.2 (citing Mapes,
13 *Timber Baron*), Ex. B.

14 If a communication by a political committee is authorized by a candidate, an authorized
15 political committee, or its agents, then it must state that it has been paid for by such authorized
16 political committee. 52 U.S.C. § 30120(a)(1) (formerly 2 U.S.C. § 441d(a)(1)); 11 C.F.R.
17 § 110.11(a)(1), (b)(2). If a communication is not authorized by a candidate, an authorized
18 political committee of a candidate, or its agents, then it must state the name and permanent street
19 address, telephone number or World Wide Web address of the person who paid for the
20 communication and state that it is not authorized by any candidate or candidate's committee.
21 52 U.S.C. § 30120(a)(3) (formerly 2 U.S.C. § 441d(a)(3)); 11 C.F.R. § 110.11(b)(3).

¹⁰ See also Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545, 12,546 (Mar. 16, 2007) (stating that dismissal is appropriate where the matter does not merit further use of Commission resources due to the vagueness of the evidence).

1 The available transcript and audio clip of the radio advertisement do not include an
2 address, phone number, or World Wide Web address for the committee. In addition, the radio
3 advertisement misstates the committee's full name as "If He Votes Like That In Salem Imagine
4 *How He Will Vote* In Congress" (emphasis added). If He Votes' Response acknowledges that
5 the omission of an address or phone number occurred, and states that the advertisement ran
6 "about 12 times" without the full disclaimer from April 9, 2014, to April 11, 2014. If He Votes
7 Resp. at 6. If He Votes further states that once this omission was discovered, a corrected,
8 "nearly identical" advertisement was placed back on the air, which ran until May 16, 2014. *Id.*

9 Although If He Votes failed to include a complete disclaimer on the radio advertisement,
10 we recommend that the Commission dismiss with caution the allegations that If He Votes
11 violated 52 U.S.C. § 30120(a) (formerly 2 U.S.C. § 441d(a)) based on the circumstances of the
12 violation.¹¹ *See Heckler*, 470 U.S. 821. Specifically, it appears that If He Votes made efforts to
13 correct the omission upon discovery and that the advertisement aired only 12 times with the
14 incomplete disclaimer. In addition, to the extent that the advertisement lacked the full disclaimer
15 and provided the incorrect name for the committee, given the committee's distinctive naming, it
16 is unlikely that the public was either intentionally or unintentionally misled as to who approved
17 the message.

¹¹ In similar situations where there was a failure to include the requisite disclaimer but there was some information identifying the committee, the Commission has dismissed the alleged disclaimer violation and issued a letter of caution. *See, e.g.*, MUR 6683 (Fort Bend County Democratic Party, *et al.*); MUR 6633 (Republican Majority Campaign PAC, *et al.*); MUR 6438 (Arthur B. Robinson, *et al.*); MUR 6270 (Rand Paul Committee, *et al.*); MUR 6278 (Joyce B. Segers, *et al.*); *see also* Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545, 12,546 (Mar. 16, 2007) (stating that "dismissal with admonishment" is appropriate where complaint "convincingly alleges a violation, but the significance of the violation is not sufficient to warrant further pursuit by the Commission").

D. There is reason to believe that If He Votes failed to file a 48-Hour Independent Expenditure Report for the radio advertisement.

Finally, the Complaint alleges that If He Votes Failed to file 48-Hour Independent Expenditure Reports for the billboard and the radio advertisement. Compl. at 5. If He Votes reported making a \$5,950 disbursement for billboard expenses on March 19, 2014, on its 2014 April 2014 Quarterly Report, and \$59,557 in total independent expenditures for "radio ads" between April 1, 2014, and April 3, 2014, on its 2014 12-Day Pre-Primary Report. If He Votes does not appear to have filed any 48-Hour Independent Expenditure Reports for these expenditures.¹²

The Act defines "independent expenditure" as an expenditure by a person expressly advocating the election or defeat of a clearly identified federal candidate that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents. 52 U.S.C. § 30101(17) (formerly 2 U.S.C. § 431(17)). A political committee that makes independent expenditures "aggregating \$10,000 or more at any time up to and including the 20th day before the date of an election shall file a report describing the expenditures within 48 hours." 52 U.S.C. § 30104(g)(2)(A) (formerly 2 U.S.C. § 434(g)(2)(A)). The political committee must ensure that the Commission receives such reports by the end of the second day "following the date on which a communication that constitutes an independent expenditure is publicly distributed or otherwise publicly disseminated." 11 C.F.R. § 104.4(b)(2).

¹² On August 25, 2014, the Commission sent a Request for Additional Information ("RFAI") to If He Votes referencing its 2014 12-Day Pre-Primary Report and the committee's failure to file the required 48-Hour Report for the April 1, 2014, independent expenditures, which totaled \$51,637. On September 29, 2014, If He Votes filed a 24-Hour Report for the April 1, 2014, independent expenditures referenced in the RFAI.

1 With respect to the billboard, we conclude that it was not an independent expenditure
2 because it did not expressly advocate against Conger. *See* 11 C.F.R. § 100.22.¹³ Specifically,
3 although the billboard implies that Conger votes with Democrats and will do the same in the
4 Senate, that message could be negative or positive depending on the viewer, and there is no
5 explicit call to action with respect to defeating Conger in the Senate race. Accordingly, we
6 recommend that the Commission find no reason to believe that If He Votes failed to file a 48-
7 Hour Report for the billboard.

8 With respect to the radio advertisement, however, we conclude that it was an independent
9 expenditure because the statement "So now we're gonna vote 'no' on Jason Conger!" expressly
10 advocates for Conger's defeat. *See* 11 C.F.R. § 100.22(a). Further, If He Votes reported making
11 \$51,637 in independent expenditures for "radio ads" on April 1, 2014, on its 2014 Pre-Primary
12 Report, but did not file a 48-Hour Report for these expenditures. Accordingly, we recommend
13 that the Commission find reason to believe that If He Votes violated 52 U.S.C. § 30104(g)
14 (formerly 2 U.S.C. § 434(g)).

¹³ Under the Commission's regulations, a communication is "expressly advocating" when it uses phrases such as "vote for the President," "re-elect your Congressman," or "Smith for Congress," or uses campaign slogans or individual words, "which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s)" 11 C.F.R. § 100.22(a); *see Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986). The second part of this regulation encompasses a communication that, when taken as a whole and with limited reference to external events, "could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because" it contains an "electoral portion" that is "unmistakable, unambiguous, and suggestive of only one meaning" and "reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action." 11 C.F.R. § 100.22(b).

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13 **V. RECOMMENDATIONS**


- 14 1. Find no reason to believe that If He Votes Like That In Salem Imagine What He
15 Will Do In Congress and Carol Russell in her Official Capacity as Treasurer and
16 Andrew Miller violated 52 U.S.C. § 30116(a) and (f) (formerly 2 U.S.C. § 441a(a)
17 and (f)).
18


2. Find no reason to believe that Dr. Monica Wehby for U.S. Senate and Bryan Burch in his Official Capacity as Treasurer and Dr. Monica Wehby violated 52 U.S.C. § 30116(a) and (f) (formerly 2 U.S.C. § 441a(a) and (f)).
3. Dismiss the allegation that If He Votes Like That In Salem Imagine What He Will Do In Congress and Carol Russell in her Official Capacity as Treasurer violated 52 U.S.C. § 30104(b) (formerly 2 U.S.C. § 434(b)).
4. Dismiss with caution the allegation that If He Votes Like That In Salem Imagine What He Will Do In Congress and Carol Russell in her Official Capacity as Treasurer violated 52 U.S.C. § 30120(a) (formerly 2 U.S.C. § 441d(a)).
5. Find no reason to believe that If He Votes Like That In Salem Imagine What He Will Do In Congress and Carol Russell in her Official Capacity as Treasurer violated 52 U.S.C. § 30104(g) (formerly 2 U.S.C. § 434(g)) with respect to the billboard.
6. Find reason to believe that If He Votes Like That In Salem Imagine What He Will Do In Congress and Carol Russell in her Official Capacity as Treasurer violated 52 U.S.C. § 30104(g) (formerly 2 U.S.C. § 434(g)) with respect to the radio advertisement.
7. Approve the attached Factual & Legal Analyses.
8. Enter into conciliation with If He Votes Like That In Salem Imagine What He Will Do In Congress and Carol Russell in her Official Capacity as Treasurer prior to a finding of probable cause to believe.
- 9.

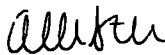
10. Approve the appropriate letters.

12-15-14
Date

BY:


Kathleen Guith
Deputy Associate General Counsel


Mark Shonkwiler
Assistant General Counsel


Allison T. Steinle
Attorney

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